

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUSTIN JAMES HICKS,

Defendant-Appellant.

UNPUBLISHED

September 20, 2007

No. 270898

Saginaw Circuit Court

LC No. 05-026488-FH

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession of a weapon by a prisoner, MCL 800.283(4), and was sentenced as an habitual offender, fourth offense, MCL 769.12, to 36 months to 15 years in prison. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arises from the discovery of a homemade knife ("shank") in defendant's prison locker. The defense theory was that the shank might have been planted.

Defendant argues that the trial court's admission of testimony regarding defendant's security level was an abuse of discretion because it was improper evidence of "prior bad acts" under MRE 404(b). Although defendant objected to this evidence at trial, he did so only on the basis of relevancy. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Therefore, we review this unpreserved evidentiary issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999).

MRE 404(b)(1) prohibits "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." Evidence that defendant had a security level of four was not evidence of other "crimes, wrongs, or acts." Therefore, MRE 404(b) is not implicated. Even if that rule did apply, however, the evidence was not offered or considered as proof of defendant's character. Rather, the trial court found that the evidence was relevant for a noncharacter purpose, i.e., to show that defendant was subject to a higher level of supervision, making it less probable that other prisoners would have access to his prison cell. Therefore, a plain error has not been shown. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

Defendant also argues that trial counsel was ineffective for failing to question the corrections officer who discovered the weapon about rumors that locks securing the prisoners' lockers could be opened by yanking on them, as defense counsel did at the preliminary examination.

Because defendant did not move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent from the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show "that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Id.*, p 578 (citations and internal quotation marks omitted). A defendant "must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate that counsel's deficient performance "was so prejudicial to him that he was denied a fair trial." *Id.* He must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Id.*, pp 302-303 (citations and internal quotation marks omitted).

A trial counsel's decisions concerning what witnesses to call and what evidence to present are matters of trial strategy. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, the proposed testimony ("rumors" that locks could be opened by yanking on them), would have been hearsay. MRE 801. Furthermore, regardless of the admissibility of such evidence, there is no reasonable possibility that mere "rumors" that locks could be opened by yanking on them would have changed the outcome of the trial. Therefore, defendant was not prejudiced by counsel's failure to present this testimony.

Defendant has also filed a brief in propria persona that is a combination civil rights complaint and appellate brief. Of the four issues stated in the statement of questions presented only one suggests a legal issue that is pertinent to appellate review of defendant's conviction. Defendant claims that counsel was ineffective for failing to investigate his claim that he was "set-up" by the prison guards. In his argument, defendant additionally argues that defense counsel was ineffective for failing to file motions to have the weapon tested for fingerprints by an independent laboratory, for production of the unit videotape to establish who performed the search and how many cells were checked, and for production of "Institutional Departmental [sic] Memorandum's [sic] or Unit Log Book's [sic]." Defendant also argues that defense counsel failed to investigate the guards' files to determine bias, and claims that counsel advised him to plead guilty and refused to investigate leads.

None of defendant's claims are supported by the existing record. Although defendant also requests a remand for an evidentiary hearing, his request is untimely under MCR 7.211(C)(1). Furthermore, defendant's request is not accompanied by an affidavit or offer of proof demonstrating factual support for his claims of ineffective assistance of counsel.

Defendant's mere assertion that further investigation might aid him does not satisfy the requirements of MCR 7.211(C)(1). Accordingly, a remand is not warranted.

Affirmed.

/s/ Richard A. Bandstra

/s/ Michael J Talbot

/s/ Karen M. Fort Hood